No. 96-1881

IN THE

Supreme Court of the United States

October Term, 1996

Supreme Court, U.S.
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JOSEPH F. GAZZA,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a determination by the New York State Court of Appeals that the State's wetlands regulation left petitioner with ample economically beneficial use of his property and did not deprive him of a reasonable investment-backed expectation of value, based upon judicial findings of fact after trial, raises a constitutional issue warranting review by this Court.

2. Whether this case presents a satisfactory context in which to determine whether a pre-existing rule of state law imposing a use limitation upon title at the time property is acquired may constitute a compensable taking under the Fifth and Fourteenth Amendments.

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STATEMENT OF THE CASE

The petition in this matter seeks review by this Court of an opinion and order of the New York State Court of Appeals,

dated February 18, 1997 (PA1a-24a),[1] which upheld against petitioner's constitutional challenge, as had the New York Supreme Court (PA45a-51a) and the Appellate Division, Second Department (PA25a-44a) before it, a decision of the Commissioner of the New York State Department of Environmental Conservation (PA52a-75a), denying petitioner's application for a tidal wetland permit and variances from setback requirements to build a house and sewage septic system on a one-acre parcel in the Village of Quogue, New York. Petitioner, a professional real estate developer and lawyer specializing in real estate and land use law and the owner of numerous properties in the Town of Southampton and the Village of Quogue, purchased the subject parcel in 1989 for $100,000 (PA26a). Approximately 65% of the parcel is tidal wetland; the remainder is a regulated adjacent area. A permit has been required for construction on such lands pursuant to the New York State Tidal Wetlands Act, Environmental Conservation Law ("ECL") Article 25, since September 1973. At the time of the lot's purchase, petitioner was intimately acquainted with the wetlands and zoning regulations governing its use; he was familiar with a recent court decision which had upheld the tidal wetlands boundary (A58-62, A65-66, A75) (*see, Thomas Thompson v. Dep't of Envtl. Conservation*, 130 Misc.2d 123 (Sup. Ct. Suffolk Co. 1985), *aff'd*, 132 A.D.2d 665 (2d Dept. 1987); he had been warned by staff of the Department of Environmental Conservation ("DEC") that the best use of the property "would be perhaps a self-contained trailer" (SA442), and that the purchase should be made contingent upon obtaining DEC and other regulatory approvals for the

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[1]Numbers in parentheses with the prefix "PA" refer to pages of the appendix to the Petition in this matter. Numbers in parentheses preceded by the prefix "A" or "SA" refer to the Appellant's Appendix, or Respondent's Supplemental Appendix, before the New York State Court of Appeals.

use he sought (SA438-439); he had hired engineers and surveyors who were aware of the wetlands regulations, and who later testified that those regulations, and the local zoning ordinance, apparently precluded a "building envelope" on the property (A392, Ex. 13; A71, A102, A277).[2] Indeed, in June 1989—six months before purchasing the property—petitioner applied to the DEC for a permit seeking a substantial variance from the structure and septic system setbacks contained in the DEC's tidal wetland regulations (SA479). Nonetheless, on November 29, 1989, without a final decision from the DEC regarding his permit application and variance request, petitioner closed on the property (A25, A112; SA476-477).

Subsequent to the closing and following a full evidentiary hearing to consider petitioner's permit application, a DEC administrative law judge ("ALJ") issued a hearing report recommending that the permit be denied (PA55a-78a). The ALJ concluded that petitioner had failed to meet his burden of demonstrating that his proposed project was compatible with the Tidal Wetlands Act; or that the project would preserve and protect tidal wetlands or prevent their despoliation and destruction; or that variances should be granted for any other reason (PA77a). The Commissioner of the Department of Environmental Conservation subsequently adopted the ALJ's findings and conclusions, and issued a decision denying the application (PA52a-54a). In that decision, the Commissioner ruled that a permit for a dock, a catwalk, and a parking area might be issued upon petitioner's application (PA54a).

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[2]Regulations require a house to be set back 75 feet from the tidal wetlands line and a septic system to be set back 100 feet. *See* ECL §§ 25-0302, 25-0401, and 6 New York Codes, Rules and Regulations ("NYCRR") Part 661, particularly 6 NYCRR §661.6(a)(1) and (2).

Upon petitioner's commencement of a proceeding to review this decision pursuant to Environmental Conservation Law § 25-0404, the New York State Supreme Court, after a trial, confirmed the Commissioner's decision and rejected petitioner's claim that the tidal wetlands regulations deprived him of property without compensation in violation of the Fifth and Fourteenth Amendments. *Matter of Gazza v. New York State Department of Environmental Conservation*, 159 Misc.2d 591 (Sup. Ct. Suffolk Co. 1993) (PA45a-51a). Among its findings of fact, Supreme Court noted that respondent's real estate expert appraised the property, as protected under wetlands regulations, at approximately $80,000; and that a local resident had made an offer for the property, not yet withdrawn, of $50,000 (PA49a). At trial, petitioner's appraiser testified that the value of the property without the wetlands restriction would be $396,000 (PA4a). The Appellate Division unanimously affirmed the Supreme Court's findings and order. *Matter of Gazza v. New York State Department of Environmental Conservation*, 217 A.D.2d 202 (2d Dept. 1995).

Upon petitioner's further appeal, the New York State Court of Appeals affirmed the order of the Appellate Division on two distinct grounds. *Matter of Gazza v. New York State Department of Environmental Conservation*, ___ N.Y.2d ___ (1997); 1997 WL 68590 (N.Y.) (PA1a-24a). As a general matter, the court held that the regulations promulgated under the Tidal Wetlands Act constituted a pre-existing rule of State law which imposed a limitation upon title at the time petitioner acquired the property (PA11a). While the court agreed that those regulations gave petitioner an expectation that the DEC would consider any variance request in accordance with the requirements of the Act, including the promotion of public safety and welfare and the achievement of substantial justice (6 New York Code of Rules and Regulations § 661.11), it rejected petitioner's contention

that they gave him an absolute right to build a one-family dwelling on the property (PA13a). Since the DEC denial of petitioner's variance application was supported by substantial evidence and was otherwise correct, the court rejected his takings claim (PA13a-14a). Significantly, the court noted that petitioner had not based that claim on an assignment of rights of prior holders of title to the parcel; the court consequently declined to address "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited, or otherwise assigned" (PA11a, n 3). The court further noted that the limits in petitioner's title did not bar a claim that the particular wetlands regulations were beyond the State's power or were otherwise unconstitutional or illegitimate, although petitioner raised no such claim in this case (PA11a-12a).

As a separate ground for its affirmance, the court found that petitioner had failed to meet his burden of demonstrating a fundamental factual element of a takings claim: the sufficient deprivation of economic value in the land. Noting that the "mere diminution in the value of the property, however serious, is insufficient to demonstrate a taking" (PA17a, *quoting Concrete Pipe & Products of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 [1993]), and that restrictions through regulation amounted to a *per se* taking only where government has required a property owner "to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property idle" (PA15a, *quoting Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 [1992]), the court concluded that, in analysis of regulatory takings, "[t]he primary inquiry must always focus upon 'the question of the severity of the impact of the law on appellants' parcel' " (PA18a, *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136 [1978]). Because Supreme Court had justifiably concluded that petitioner could use the parcel for valuable

recreational purposes, and that "petitioner's reasonable expectations were reflected by his consideration of the inherent limitations on the property when he made the purchase offer for thousands less than its worth without the restrictions" (PA19a), the Court of Appeals determined that the wetlands limitation did not deprive petitioner of a reasonable investment-backed expectation of value, and consequently did not rise to the level of a compensable taking (PA20a, *citing Lucas*, 595 U.S. at 1030). Moreover, the court expressly rejected, on state law evidentiary grounds, petitioner's claim that the finding of value in his property ignored his obligation to obtain zoning variances from the Village of Quogue prior to employing the property in such recreational uses (PA19a-20a):

> In such circumstances, we have stated that petitioner has the burden of showing that it is unreasonable to expect relief from a zoning restriction (*de St. Aubin [v Flacke*], 68 NY2d [66], 76, 78-79 [1986]). Although petitioner did not have to complete the application process to meet his burden on the issue, his conclusory assertion that the zoning variances would not be granted is insufficient when the record contains "ample and convincing" evidence to the contrary (*Gazza* [*v New York State Department of Environmental Conservation*], 217 AD2d 202, 212). The Village Law provides that a variance may be granted if an applicant cannot realize a reasonable return without it (NY Village L § 7-712-b[2][b]).

Petitioner subsequently filed a petition for a writ of certiorari with this Court.

ARGUMENT

POINT I

BECAUSE PETITIONER FAILED TO CONTROVERT THE STATE COURTS' FACTUAL FINDING THAT THE DENIAL OF A WETLAND PERMIT DID NOT DIMINISH THE VALUE OF HIS PROPERTY SUFFICIENTLY TO CONSTITUTE A TAKING, THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI

Because petitioner in this matter has failed to challenge or controvert the holding of the Court of Appeals that the denial of a variance did not diminish the value of his property to a degree sufficient to constitute a taking under state or federal law, this Court should deny the petition for certiorari. That conclusion was based upon various findings of fact of the State Supreme Court, including the purchase price of the property ($100,000), an expert's testimony that the value was $80,000 under the recreational uses permitted by the Department, and petitioner's failure to present evidence that those recreational uses were unavailable to him.

As this Court has often observed, the mere fact that a regulation deprives an owner of the most beneficial use of his property does not render it unconstitutional. *See, e.g., Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962). Determination of whether a taking has occurred requires a more complex analysis, including examination of the economic impact of the regulation, the extent of its interference in reasonable investment-backed expectations, and the character of the government's action. *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124; *Lucas*, 505 U.S. at 1019-20. In the matter at bar, the Court of

Appeals conducted precisely such an analysis (PA15a-20a), and petitioner has failed to controvert its findings in any respect. Most critically, he has failed to demonstrate that he "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle". *Lucas*, 505 US at 1019. Moreover, in light of petitioner's extensive knowledge of the wetlands requirements and his prior consultation with the DEC, he has not shown that the regulation harmed any reasonable investment-backed expectation of value he might have entertained at the time he purchased the property.

Rather than curing the evidentiary deficiencies reflected in the decision of the Court of Appeals on the issue of diminution of value, petitioner has chosen merely to rail against it (Pet., pp. 18-21), in a brief discussion riddled with factual and interpretive errors. His claim that the court's factual finding "was an attempt to avoid this Court's holding in *Lucas v. South Carolina Coastal Council* (Pet., p. 18) is entirely unfounded; *Lucas* is discussed and cited extensively by the Court of Appeals in this portion of its decision (*see*, PA15a-17a, PA20a). His claim that the denial of a variance left his property "substantially in its natural state" (Pet., p 29) ignores the factual findings of valuable private uses which the court considered appropriate to that state, as well as the specific alterations of that natural condition (parking pad, shed, boat dock, etc.) permitted under the court's holding. His claim that the court created "insurmountable obstacles" to the vindication of his property rights by its recitation of the high evidentiary requirements of state law (Pet., p 17) ignores the court's specific holding that he had failed to make his case even under a lesser standard (PA77, n 2). His assertion that the "essential and only economically beneficial or productive use" of his property "is single family residential" (Pet., p 21) is unfounded and erroneous. Indeed, given the size and character

of the lot—tidal wetland with a small amount of upland subject to occasional flooding—its most obvious and natural use is to provide access to the water for various purposes, as permitted by the DEC.

In sum, the Court of Appeals' affirmance of the factual finding that the property retained substantial value even as limited by regulation was made under well-settled takings principles and contains no novel analysis or interpretation of either state or federal law. Nor is there reason for this Court to review the determination that, under the facts of this case, petitioner was not deprived of a reasonable investment-backed expectation of value or use of his property. On the contrary, the decision on that issue was both correct and unexceptional.

POINT II

PETITIONER'S CLAIM THAT THE HOLDING AT ISSUE DENIES COMPENSATION FOR ANY REGULATORY TAKING TO ALL SUBSEQUENT PROPERTY TRANSFEREES IS NEITHER ACCURATE NOR SUFFICIENT TO WARRANT THIS COURT'S REVIEW

As an additional ground for seeking certiorari in this matter, petitioner has argued that the New York State Court of Appeals "held that the right of a property owner to make economically viable use of the privately-owned land could be extinguished by a mere statutory enactment followed by a transfer to title of real property" (Pet., p. 22). This is an inaccurate assessment of the court's holding. As we have noted above, the court expressly declined to address the issue of whether a property owner's taking claim could be devised or transferred to another person or property holder (PA11a, n 3). The court found no need to

address that matter in this case because petitioner at no time asserted that he was the recipient of such a transferred claim; indeed, the testimony of petitioner's own appraiser made clear that the consideration which petitioner paid for the property ($100,000) did not reflect the alleged value of a parcel unencumbered by regulations ($396,000). Consequently, inasmuch at the Court of Appeals has not ruled dispositively upon the principal issue which petitioner cites as in conflict with other jurisdictions and warranting this Court's review, the petition for a writ of certiorari should be denied.

In any event, petitioner's argument that pre-existing regulatory limitations may not diminish a property owner's takings claim (Pet., pp. 15-18) is unfounded. As this Court observed in *Lucas* (505 U.S. at 1027), this Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." Even in the extreme case where a regulation deprives land of all economically beneficial use, no compensable taking occurs "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with" (505 U.S. at 1027). In this matter, the Court of Appeals reviewed the lower court's detailed inquiry into the nature of petitioner's estate in the subject property, including the amount of his monetary investment, the purpose of the enactment of the wetlands regulations, and the scope of petitioner's knowledge of the permissible uses of the property at the time of its purchase. It considered as well the accepted principles of New York State law that, following the enactment of the wetlands regulations, "the only permissible uses for the subject property were dependent upon those regulations which were a legitimate exercise of police power" (PA14a). Under these circumstances, the court correctly determined that petitioner, an

experienced real estate developer, had no reasonable investment-backed expectation of, and at no time possessed, a right to build a one-family home upon the parcel (PA5a-14a). Consequently that purported right cannot be the basis for a takings claim.

Petitioner's contrary contentions are meritless. His description of the Court of Appeals holding — "that a landowner has no protectable property interest where the application of a pre-existing land use regulation results in the elimination of all use of land" (Pet., p. 14) — reflects a profound miscomprehension of the court's opinion in this matter. His claim that the Tidal Wetlands regulations constitute a *per se* taking (Pet., p. 14), is self-evidently false. His assertion that the decision conflicts with language contained in a footnote in this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (Pet., pp 16-17) overlooks a subtlety which this Court recognized in *Lucas* (505 U.S. at 1015): the right to exclude strangers from private property, at issue in *Nollan* and not implicated in the case at bar, remains a reasonable expectation of private property owners even where programs of regulation place substantial limitations upon the use of property by the owner. Indeed, this distinction was set forth with considerable clarity in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), which petitioner erroneously cites in support of his claims (Pet., pp 27-29). Noting that possessory interests, such as those relating to an easement over property, are fixed at the time they are created and cannot be extinguished by legislation or regulation without compensation, the court in *Preseault* emphasized the difference between those interests and regulatory restraints on use (100 F.3d at 1540 [emphasis in original]):

> This issue of title and ownership expectation must be distinguished from the question that arises when the Government restrains an owner's *use* of property,

> through zoning or other land use controls, without disturbing the owner's *possession*. Placing restraints on an owner's use of her property invokes the regulatory takings issue, rather than the question of the Government's physical occupation of private property, and both factually and legally raises significantly different issues. In the regulatory taking cases the owner's reasonable investment-backed expectations have been held to be relevant to the question of whether a regulatory imposition goes too far in constraining the owner's lawful uses of the property. [citation omitted] As the Supreme Court makes clear, these two quite different situations call for different analyses.

Petitioner's reliance upon other case authority in support of his petition for a writ of certiorari is equally unavailing. His claim that the Court of Appeals decision conflicts with the decisions of other state courts—*Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (Fla. App. 5th Dist.), *review denied*, 613 So.2d 3 (Florida 1992); *Lopes v. Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (Mass. 1994); *Moroney v. Mayor and Council*, 268 N.J. Super. 458, 633 A.2d 1045 (N.J. Super. A.D. 1993); *K & K Construction v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (Ct. App. Mich. 1996)—is neither accurate nor relevant. The fact that some states might take a different view than New York of the scope of claims after a property transfer does not alter in the slightest the reasonable investment-backed expectations of property owners in New York, where such claims are restricted. This difference in expectation in various states does not rise to a federal constitutional issue worthy of this Court's review.

Moreover, these cases are readily distinguishable from the matter at bar. In *Lopes*, the plaintiff challenged the validity of a zoning regulation, rather than an award of damages (417 Mass. 299, 302); while petitioner in the instant matter raised no such claim, the Court of Appeals indicated that such challenges were available to property owners without regard to the date of acquisition (PA11a-12a). In *Vatalaro*, a Florida intermediate appellate court set forth the unexceptional proposition that where "land is purchased with future development legitimately anticipated and with no existing bar thereto," and "all economically viable use of the property has been taken" by a permit denial (601 So.2d at 1229), a compensable taking occurs; that holding is irrelevant to the instant matter. In *Moroney*, a New Jersey intermediate appellate court held that an ordinance permitting issuance of a variance in cases of "undue hardship" to owners of substandard building lots created a reasonable expectation of development to lot purchasers (268 N.J.Super. at 466-67, 633 A.2d at 1049); no comparable expectation is alleged to derive from the Tidal Wetlands Act. In *K & K Construction*, an intermediate Michigan appellate court held that a purchaser may appeal the denial of a permit to build on wetlands even when he purchased the parcel after the implementation of the regulatory scheme in cases where the denial would render a parcel worthless; in the instant matter, petitioner's parcel was expressly found to retain considerable value under the uses permitted by the DEC.

Furthermore, there is ample authority in other jurisdictions supporting the court's holding in the matter at bar. *See, e.g., Leonard v. Town of Brimfield*, 423 Mass. 152, 66 N.E.2d 1300 (1996) (upon denial of special subdivision permit, purchaser of property on flood plain subject to building restrictions "may not complain about the loss of a right she never acquired"); *Alegria v. Keened*, 687 A.2d 1249, 1253-54 (R.I. 1997) (investor's

expectation to develop wetlands property through permit process was "unreasonable in light of this state's pervasive wetlands regulations"); *see also, Grant v South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (S.C. 1995) (property right limited by regulations in effect at time of purchase); *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995) (no investment-backed expectation to maintain a building violative of codes in effect at time of purchase); *Hynziker v. State of Iowa*, 519 N.W.2d 367 (Iowa 1994) (no reasonable expectation of building permit when regulation requiring protection of burial ground was in place at time of purchase).

In sum, the Court of Appeals holding that petitioner did not acquire a right to construct a one-family dwelling at the time he purchased the wetlands parcel is rational, fully consistent with this Court's holdings and all authority cited by petitioner, and otherwise unworthy of this Court's review.

CONCLUSION

As petitioner has not refuted the finding of the Court of Appeals that his property suffered no substantial diminution in value through the regulation, and as the court's opinion and order are consistent in all respects with the decisions of this Court and all other courts referenced in the petition, this Court should deny the petition for a writ of certiorari. The questions presented under the specific facts of this case are neither novel nor significant, and do not warrant further review.

Dated: New York, New York
June 25, 1997

Respectfully submitted,

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